

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, N.E.; Second Floor
Washington, D.C. 20002

Petitioner , on behalf of STUDENT, ¹)	Case Number:
)	
Petitioner,)	Hearing Date: September 20, 2010
)	Room: 5B
v.)	
)	Date Issued: October 23, 2010
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,)	
)	Hearing Officer: Frances Raskin
Respondent.)	

HEARING OFFICER DETERMINATION

I. JURISDICTION

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("IDEA"), 20 U.S.C. §§ 1400 *et seq.*; federal regulations implementing IDEA, 34 C.F.R. Part 300; D.C. Code § 38-2561.01 *et seq.*; and D.C. Mun. Reg. § 5e-3000 *et seq.* On September 21, 2010, this Hearing Officer was appointed to preside over this case, consistent with 34 C.F.R. § 300.511.

II. BACKGROUND

Petitioner is the mother of a _____-year-old, special-education student ("Student").² On August 18, 2010, Petitioner filed a Due Process Compliant

¹ Personal identification information is provided in Attachment A.

² In the Complaint, counsel for Petitioner disclosed the nature of the Student's various criminal arrests, including for more than one felony. This Hearing Officer advised counsel for Petitioner that juvenile criminal proceedings are kept under seal and that, in disclosing this information, she may have violated Rule 1.6 of the District of Columbia Rules of Professional Conduct. After a brief conversation, it became clear that counsel for Petitioner was unfamiliar with her duties pursuant to this Rule or its application to the instant case. This Hearing Officer suggests that counsel for Petitioner contact ethics counsel for the District of Columbia Bar to further discuss her duty to safeguard client

("Complaint") against the District of Columbia Public Schools ("DCPS") pursuant to IDEA alleging that DCPS failed to conduct a manifestation determination review ("MDR") after the Student was suspended for twelve days. Petitioner alleges that the Student was expelled from his DCPS senior high school on May 14, 2010. Petitioner also alleges that DCPS failed to conduct a functional behavioral assessment ("FBA") and revise the Student's behavior implementation plan following the incident that led to his expulsion. Petitioner alleges that DCPS failed to provide the Student services in an interim alternative setting after his expulsion.

In its Response to the Complaint,³ DCPS asserts that the Student was not expelled from the DCPS senior high school and was allowed to return following his suspension. DCPS asserts that it conducted an MDR on May 24, 2010. DCPS asserts that it conducted an FBA and developed a BIP on June 21, 2010, following the Student's suspensions.

Petitioner further alleges that DCPS failed to develop an appropriate IEP for the Student on June 15, 2010. Petitioner alleges that the IEP lacks sufficient baseline information for each of the goals in mathematics, reading, and writing. Petitioner alleges that the IEP provides insufficient speech language services and fails to provide sufficient information about the Student's present levels of performance in this area.

DCPS asserts that it convened a duly constituted IEP team that included a representative from the Department of Youth Rehabilitation Services ("YRS"). DCPS asserts that (1) it developed an IEP that contains goals that are reasonably calculated to provide the Student educational benefit; (2) it was unable to ascertain the Student's present levels of performance and incorporate them in the IEP because the Student failed to attend school and was present for only four days in the 2009-2010 school year; and (3) it developed the Student's IEP based on valid evaluation data.

Petitioner alleges that DCPS failed to address the Student's need for extended school year ("ESY") services. Finally, Petitioner alleges that DCPS failed to provide the Student an appropriate placement and location of services for the 2009-2010 and 2010-2011 school years.

DCPS further asserts that it considered all data and input from the IEP team members in determining that the Student does not require ESY services. Finally, in response to Petitioner's claim that DCPS failed to provide the Student an appropriate placement and location of services for the 2010-2011 school year, DCPS asserts that it recommended that the Student receive 25.5 hours of specialized instruction, one hour of speech-language services, and one hour of behavioral support (counseling) services outside the general education environment. DCPS asserts that this is an appropriate placement for the Student and is his least restrictive environment.

information and to avoid revealing information that would be embarrassing or detrimental to the Student without his express consent.

³ DCPS filed its Response to the Complaint on August 26, 2010.

Petitioner is seeking relief in the form of an order requiring DCPS to (1) update the Student's BIP and ensure her participation; (2) fund the Student's costs of attending a non-public school for the 2010-2011 school year, with transportation; and (3) fund compensatory education, including independent tutoring and counseling.

Because Petitioner raised issues relating to discipline, this Hearing Officer expedited the due process hearing, and scheduled the hearing for September 20, 2010.⁴ The parties participated in a resolution meeting on August 4, 2010. They were unable to resolve the Complaint. The parties agreed to attend an IEP meeting on August 19, 2010, in an effort to resolve the Complaint. At this meeting, the parties were unable to resolve the Complaint and agreed to proceed to a due process hearing.

This Hearing Officer held prehearing conferences on August 26 and August 30, 2010. During the prehearing conference, counsel for DCPS provided a copy of the Student's June 21, 2010 FBA. Counsel for Petitioner then withdrew Petitioner's claim regarding the failure of DCPS to conduct an FBA.

This Hearing Officer issued a Prehearing Order on August 30, 2010. The parties participated in a resolution session meeting on September 8, 2010.

The due process hearing convened on September 20, 2010. At the outset of the hearing, counsel informed this Hearing Officer that the parties had attended a meeting on September 14, 2010, during which they developed a compensatory education plan for the Student. The parties discussed the Student's BIP, and agreed that once the Student is placed in a new school that they would convene a meeting to amend the Student's IEP to include present levels of performance and baseline data, and review and revise the BIP as needed.

Counsel for Petitioner then informed this Hearing Officer that Petitioner was withdrawing her claims regarding the failure of DCPS to conduct an MDR, and her request for compensatory education, as a result of the agreement between the parties that DCPS would provide compensatory education to the Student as outlined in the September 14, 2010, compensatory education plan.⁵ Petitioner also withdrew her claims regarding the appropriateness of the Student's IEP, including the failure of DCPS to include present levels of performance and baseline data.

⁴ A due process hearing involving disciplinary issues, including the failure of a local educational agency ("LEA") to convene an MDR when a special education student is suspended, must be held within twenty school days of the filing of the due process complaint. 34 C.F.R. § 300.532 (C)(2). Although Petitioner filed the Complaint on August 18, 2010, the first day of the school year was August 23, 2010. Thus, this Hearing Officer held that IDEA required the due process hearing to be held within twenty school days of August 23, 2010. Labor Day, September 6, 2010, was a federal holiday. The due process hearing took place on the twentieth school day, September 23, 2010.

⁵ Petitioner's withdrawal of this issue changed the timeline of this case from an expedited timeline to the regular forty-five day due process hearing timeline. This Hearing Officer is issuing this HOD on the forty-fifth day.

The parties stipulated that the Student's current IEP, developed on June 15, 2010, is appropriate for the Student and that it constitutes a "full-time" placement. Counsel for Petitioner represented that Petitioner was withdrawing her claims regarding the appropriateness of the Student's IEP, including the goals on the IEP, except for her claims that DCPS failed to provide an appropriate setting and location of services for the Student. Counsel for Petitioner also represented that Petitioner is not pursuing any claim regarding Petitioner's lack of participation in the development of the June 15, 2010, IEP.

The parties further informed this Hearing Officer that, at the September 8, 2010, resolution meeting, DCPS offered to place the Student in another DCPS school ("DCPS" School") for the 2010-2011 school year. The parties stipulated that the only remaining legal issue for adjudication is whether DCPS failed to provide the Student an appropriate location of services, i.e., whether School 1 can implement the Student's June 15, 2010, IEP.⁶

At the conclusion of the testimony of Petitioner's witnesses, and after she rested her case, counsel for DCPS orally moved for a directed verdict. For the reasons explained below, this Hearing Officer granted the motion for directed verdict.

IV. ISSUE PRESENTED

Whether DCPS denied the Student a FAPE by failing to provide the Student a location of services that can implement the Student's IEP.

V. FINDINGS OF FACT

1. Petitioner is the mother of a _____-year-old, special-education student ("Student").⁷ The Student was found eligible for special education when he was in third grade.⁸ He was diagnosed with attention deficit, hyperactivity disorder.⁹

2. The Student began to exhibit behavioral difficulties when he was three or four years old.¹⁰ He hit other children in the neighborhood, liked to challenge and fight bigger kids, and was perceived to be a bully in his home and school settings.¹¹

⁶ After determining the issue to be adjudicated, this Hearing Officer admitted Petitioner's Exhibits 1, 3, 4-5, and 7-8. This Hearing Officer did not admit Petitioner's Exhibits 2, 6, 7, and 9 on the grounds that they were duplicative of documents DCPS disclosed. This Hearing Officer admitted DCPS Exhibits 1-6, and 8. This Hearing Officer excluded DCPS exhibit 7, the September 14, 2010, compensatory education plan as not relevant to the issue to be adjudicated.

⁷ Testimony of Petitioner.

⁸ *Id.*; Petitioner Exhibit 8 (July 5, 2006, report of Clinical Psychological Evaluation ("Clinical Evaluation")).

⁹ Clinical Evaluation.

¹⁰ *Id.*

3. When the Student was in his early teens, he exhibited mood swings that included episodes of explosive anger often triggered when he did not get his way.¹² When angry, he tended to yell and scream and it was difficult for him to deescalate his anger.¹³ His behavior significantly improved when he took his ADHD medication.¹⁴

4. The Student also experienced symptoms associated with anxiety, including nightmares and headaches.¹⁵ This may have been a result of the stress he felt as a result of the harsh and violent environment of his neighborhood and school setting.¹⁶

5. The Student's full scale IQ is 66, which classifies his intelligence as extremely low and places him in the first percentile when compared with other adolescents his age.¹⁷ In other words, his overall performance exceeds only about 1 percent of his peers.¹⁸ His verbal comprehension index is 72, which is in the borderline range and places him in the third percentile of his same-age peers.¹⁹

6. The Student's perceptual reasoning is extremely low and in the first percentile of his peers.²⁰ Perceptual reasoning refers to an individual's ability to look at, synthesize, and reason with visual information.²¹

7. His working memory is in the sixth percentile and places him in the borderline range of functioning.²² Working memory, which is a measure of a person's short-term memory, refers to a person's ability to remember and respond to information sequentially.²³

8. The Student's processing speed is in the sixth percentile, which is in borderline range of functioning.²⁴ Processing speed is a measure of a person's ability to perform cognitive tasks under time pressure.²⁵

9. The Student's academic performance in broad reading is in the extremely low range of functioning and equivalent to the functioning of an average person who is

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Petitioner Exhibit 3 (February 12, 2010, report of Confidential Psychoeducational Evaluation). The parties stipulated to the findings of this evaluation.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* The Student obtained a score of 65 on the perceptual reasoning index.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

eight years and five months old and in the first month of third grade.²⁶ His academic performance in broad math is in the extremely low range of functioning, age equivalent to eight years and five months, and grade equivalent to the six month of third grade. His academic performance in written language is in the extremely low range, age equivalent to eight years and ten months, and grade equivalent to the fifth month of third grade.

10. The Student has been diagnosed with anxiety disorder, not otherwise specified, a mixed anxiety-depressive disorder, and conduct disorder.²⁷ He is depressed, fearful, socially anxious, and pessimistic.²⁸ The Student's behavior problems have adversely impacted him in the home, school, and community settings.²⁹ He has been retained and repeatedly suspended from school.³⁰

11. The Student's borderline intellectual functioning compounds his problems in home, school, and the community.³¹ His academic performance makes it even more challenging for the Student to process his experiences.³² He also has ineffective coping strategies, and tends to avoid things that upset him.³³

12. During the 2009-2010 school year, the Student attended a public senior high school ("DCPS School 1").³⁴ He missed forty-seven days of school, including numerous suspensions, between September 2009 and the end of February 2010.³⁵ Midway through the 2009-2010 school year, the Student was failing all of his classes.³⁶

13. DCPS School 1 is not an appropriate environment for the Student.³⁷ On May 28, 2010, DCPS proposed placing the Student in a different senior high school ("DCPS School 2") for the 2010-2011 school year.³⁸

14. The Student's most recent IEP was developed on June 15, 2010.³⁹ This IEP provides 25.5 hours of specialized instruction, one hour of speech language services, and one hour of behavioral support services.⁴⁰ The IEP specifies that these hours of

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Testimony of Petitioner, Petitioner Exhibits 4 (January 22, 2010, DCPS Report on Student Progress) and 5 (February 24, 2010, DCPS Attendance Summary).

³⁵ Petitioner Exhibit 5.

³⁶ Petitioner Exhibit 4.

³⁷ Stipulation of parties.

³⁸ DCPS Exhibit 8.

³⁹ DCPS Exhibit 1.

⁴⁰ Stipulation of parties.

instruction and related services are to be provided outside the general education setting.⁴¹ It also specifies that the Student is on a diploma track.⁴² The nature and/or severity of the Student's disability is such that he can make progress on his IEP goals by receiving these services outside the general education classroom.⁴³

15. The Student's June 15, 2010, IEP includes an FBA and BIP.⁴⁴ It also contains a transition plan.⁴⁵

16. The Student currently attends a DCPS Senior High School ("DCPS School 3") where he enrolled in September 2010.⁴⁶ The Student's Social Worker enrolled the Student at this school at the request of Petitioner.⁴⁷

17. The Social Worker visited DCPS School 2 in mid-September 2010.⁴⁸ This school has been restructured recently.⁴⁹ The classrooms now have fewer students, which would benefit the Student.⁵⁰

18. Most of the classes at DCPS School 2 are general education classes.⁵¹ The school also has an emotional disturbance ("ED") cluster program in which the Students are in classes separate from the general education population.⁵²

19. The Student has been accepted by a non-public school (Non-Public School) for the 2010-2011 school year.⁵³ The Non-Public School has small classes in which the student-teacher ratio is either ten students to two teaching staff, three students to one teacher, or one student to one teacher.⁵⁴ The Student would be placed in classes that provide credits toward a high school diploma, unless the Non-Public School determines that these classes are not appropriate for him.⁵⁵ The Non-Public School can implement the Student's IEP although it would provide him thirty hours of educational

⁴¹ *Id.*

⁴² DCPS Exhibit 1.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Testimony of Petitioner, Student's Social Worker.

⁴⁷ *Id.*

⁴⁸ Testimony of Social Worker.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Testimony of Student's Educational Advocate ("Advocate").

⁵² *Id.* The Advocate testified about information she garnered while visiting this school on behalf of a different student. This Hearing Officer struck these remarks from the record as not relevant to this case. The Advocate also testified that she is not sure what "full-time programs" DCPS School 2 provides.

⁵³ Testimony of Non-Public School Representative.

⁵⁴ *Id.*

⁵⁵ *Id.*

services.⁵⁶ The Non-Public School provides a variety of vocational opportunities to its students.⁵⁷ If the Student attended the Non-Public School, he would have no exposure to his non-disabled peers.⁵⁸

VI. CREDIBILITY DETERMINATIONS

The testimony of all the witnesses at the hearing was credible. Respondent presented no testimony at the due process hearing.

VII. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief.⁵⁹ Under IDEIA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.⁶⁰

FAPE “consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.”⁶¹

An LEA is obligated to provide a FAPE “for all children residing in the state between the ages of 3 and 21, inclusive.”⁶² In deciding whether an LEA provided the Student a FAPE, the inquiry is limited to (a) whether the LEA complied with the procedures set forth in IDEA; and (b) whether the Student’s IEP reasonably calculated to enable the Student to receive educational benefits.⁶³

In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child’s right to FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

⁶⁰ 20 U.S.C. § 1415 (i)(2)(c). *See also Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).

⁶¹ *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).

⁶² 34 C.F.R. § 300.101.

⁶³ *Rowley* at 206-207.

educational benefits.⁶⁴ In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.⁶⁵

VIII. DISCUSSION

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,⁶⁶ establishes annual goals related to those needs,⁶⁷ and provides appropriate specialized instruction and related services.⁶⁸ For an IEP to be “reasonably calculated to enable the child to receive educational benefits,” it must be “likely to produce progress, not regression.”⁶⁹

However, IDEA “imposes no clear obligation upon an LEA beyond the requirement that [disabled] children receive some form of specialized education.”⁷⁰ An LEA is required only to make available a “basic floor of opportunity” that is “reasonably calculated to enable the child to receive educational benefits . . . sufficient to confer some

⁶⁴ 20 U.S.C. § 1415 (f)(3)(E)(ii); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) (en banc) (“[P]rocedural flaws do not automatically render an IEP legally defective”) (citations omitted).

⁶⁵ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *Accord, Krivant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because “although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents’ request, the [parents] have not shown that any harm resulted from that error”). *See also M.M. ex rel. D.M. v. Sch. Dist.*, 303 F.3d 523, 533-34 (4th Cir. 2002) (“If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations.”); *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992) (rejecting the proposition that procedural flaws “automatically require a finding of a denial of a FAPE”); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990) (rejecting an IDEA claim for technical noncompliance with procedural requirements because the alleged violations did not result in a “substantive deprivation” of student’s rights); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990) (refusing to award compensatory education because procedural faults committed by Board did not cause the child to lose any educational opportunity).

⁶⁶ 34 C.F.R. § 300.320 (a) (1).

⁶⁷ 34 C.F.R. § 300.320 (a) (2).

⁶⁸ 34 C.F.R. § 300.320 (a) (4).

⁶⁹ *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted). The term “educational placement” refers to the type of educational program prescribed by the IEP, i.e., the general educational program, such as the classes, individualized attention, and additional services a child will receive, rather than the “bricks and mortar” of the specific school. *T.Y. v. N.Y. Dep’t. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).

⁷⁰ *Kerkam v. McKenzie*, 882 F.2d 884, 886 (D.C. Cir. 1988) (citing *Rowley*, 458 U.S. at 195).

educational benefit upon the [disabled] child,” or a program “individually designed to provide educational benefit.”⁷¹ IDEA does not require the LEA to “maximize the potential” of this Student.⁷²

In determining whether a “change in educational placement” has occurred, one must determine whether the proposed change would substantially or materially alter the child's educational program.⁷³ In determining whether the change in location would substantially or materially alter the child's educational program, the LEA must examine the following factors: whether the educational program set out in the child's IEP has been revised; whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements.⁷⁴ In other words, whether the proposed change substantially or materially affects the composition of the educational program and services provided the student.⁷⁵

In contrast, a transfer of a student from one school to another school, which has a comparable educational program, is generally considered a change in location only.⁷⁶ Simple changes in the location of a building or facility are not generally viewed to be a change in placement where there are no significant changes in the educational program.⁷⁷ Parents are not entitled to veto a local education agency's choice of schools for a student; they are only entitled to participate in the discussion regarding the location of services.⁷⁸

Here, Petitioner presented no testimony to show that on how DCPS would implement the Student's IEP at DCPS School 2. Petitioner made no effort, either personally or through the Social Worker or the Student's Educational Advocate, to visit DCPS School 2 and ascertain how this school would implement the Student's IEP. Nor did she present any evidence on the classes, setting, related services, transition services, or vocational programs that would be available to the Student at DCPS School 2. Thus, she failed to present even a scintilla of evidence to show that DCPS could not implement the Student's IEP at DCPS School 2.

⁷¹ *Id.*

⁷² *Id.* (noting that the Supreme Court stressed the lack of any such requirement four separate times in *Rowley*, 458 U.S. at 189, 197 n. 21, 198, 199).

⁷³ *Letter to Fisher*, 21 IDELR 992 (OSEP, July 6, 1994).

⁷⁴ *Id.*

⁷⁵ *Letter to Flores*, 211 IDELR 233 (OSEP Aug. 18, 1980); *Letter to Fisher*, 21 IDELR 992.

⁷⁶ *See, e.g., Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (P.S. 79) v. New York City Bd. of Educ.*, 629 F.2d 751, 753-54 (2d Cir. 1980), *cert. denied*, 449 U.S. 1078 (1980).

⁷⁷ *Letter to Flores*, 211 IDELR 233. *See also A.W. v. Fairfax County Sch. Bd.*, 372 F.3d 674, 682 (4th Cir. 2004) (where a change in location results in a dilution of the quality of a student's education or a departure from the student's LRE-compliant setting, a change in “educational placement” occurs.)

⁷⁸ *T.Y.*, 584 F.3d at 419.

IX. DECISION.

A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the moving party to the judgment.⁷⁹

If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable fact-finder would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may (a) resolve the issue against the party; and (b) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.⁸⁰ The judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.⁸¹ The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.⁸²

Here, as stated above, Petitioner failed to introduce any evidence to show that DCPS School 2 cannot implement the Student's IEP, or even that the Student had been denied a FAPE. Thus, this Hearing Officer will grant Respondent's motion for directed verdict.⁸³

⁷⁹ Fed. R. Civ. P. 50 (a) (2).

⁸⁰ Fed. R. Civ. P. 50 (a) (1).

⁸¹ *Anderson v. Liberty Lobby*, 477 U.S. 242, 250.

⁸² *Id.* at 251. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict -- "whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." *Id.* (citation omitted).

⁸³ If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. Fed. R. Civ. P. 52 (c). If a plaintiff fails to prosecute, a defendant may move to dismiss the action or any claim against it. Fed. R. Civ. P. 55 (b). Unless the dismissal order states otherwise, this dismissal operates as an adjudication on the merits. *Id.* A motion to dismiss (under Fed. R. Civ. P. 41) on the ground that plaintiff's evidence is legally insufficient should be treated as a motion for judgment on partial findings pursuant to Rule 52(c). Fed. R. Civ. P. 41, notes of Advisory Committee.

ORDER

Upon consideration of the exhibits and the testimony admitted at the hearing, and the DCPS motion for directed verdict, it is this 23rd day of October 2010 hereby:

ORDERED that the DCPS Motion for Directed Verdict is **GRANTED**;

IT IS FURTHER ORDERED that the Complaint is **DISMISSED WITH PREJUDICE**; and

IT IS FURTHER ORDERED that this Order is effective immediately.

By: /s/ Frances Raskin
Frances Raskin
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action, with respect to the issues presented at the due process hearing, in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).

Distributed to:
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